Filed 6/2/04 P. v. Gonzales CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FELIPE NIEBLAS GONZALES, Defendant and Appellant.	E034567 (Super.Ct.No. RIF097702) OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks, Judge. Affirmed.

Amador L. Corona for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Melissa A. Mandel, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant Felipe Nieblas Gonzales unsuccessfully challenges the trial court's denial of his motion to withdraw his guilty plea.

FACTUAL AND PROCEDURAL BACKGROUND

On June 14, 2001, defendant received stolen credit cards and tried to flee from a Riverside County sheriff's deputy.

A felony complaint charged defendant with one count of assaulting an officer with a deadly weapon, to wit, an automobile, or by means of force likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (c), count 1), two counts of knowingly receiving stolen property, to wit, credit cards (§ 496, counts 2 and 3), and one count of attempting to resist an officer by means of threats and violence (§ 69, count 4).

Pursuant to a plea agreement, defendant pled guilty to counts 2 and 4 in exchange for the dismissal of counts 1 and 3, and a prison term of 16 months. On October 4, 2001, the trial court imposed the stipulated prison term. Almost two years after sentencing, on July 11, 2003, defendant filed a motion to withdraw his guilty plea on the ground he was not adequately advised of the immigration consequences of his plea. Defendant's declaration was attached to his motion. The declaration stated: In 1990 he obtained a green card and became a lawful permanent resident; in 1998 he married a United States citizen; he and his wife have three children who were born here; on September 5, 2001, he pled guilty to receiving stolen property (§ 496) and resisting arrest (§ 69) and was sentenced to 16 months in state prison; before entering his guilty plea, he asked his deputy public defender if pleading guilty would cause him to lose his green card and she said "it would not be a problem"; he was not aware that the plea form which he signed

stated "this conviction may have the consequences of deportation"; he signed the form because his attorney told him he had to in order to take the deal, but he did not initial the immigration advisement, line six, on the form and he believed his attorney when she told him it would not cause problems with immigration; the judge who took his guilty plea did not advise him that he would be deported if he pled guilty; he would not have pled guilty if he had been advised of the immigration consequences; he would have gone to trial or he would have asked his attorney to attempt to obtain a disposition that would not affect his immigration status; in June 2002, the Immigration and Naturalization Service commenced proceedings to revoke his green card and deport him as a consequence of his conviction for receiving stolen property; he hired an immigration attorney who informed him there was no relief available and he was deported in April 2003.

At the hearing on defendant's motion, the trial court stated it had read the moving papers and response and had taken judicial notice of the file. When the court inquired whether trial counsel would testify, defense counsel responded in the negative. Denying the motion, the court stated: "[U]nder the circumstances, having read your motion, as well as having examined the sentencing that was conducted by [another judge], and as well as the manner in which the defendant initialed the forms, I note that [the judge did] ask whether or not [defendant] had reviewed the front and reverse of these forms with his attorney. And even his affidavit indicates that he was cognizant of the immigration consequences, that he was asking about them. And based upon the form only, I would

---

[footnote continued from previous page]

[1]All statutory references are to the Penal Code unless otherwise indicated.

deny your motion. I think it does -- I think it is sufficient under these circumstances."

DISCUSSION

On appeal, defendant contends the trial court abused its discretion in denying his motion to withdraw his guilty plea. We affirm.

"To prevail on a motion to vacate under section 1016.5,[2] a defendant must establish that: (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement." (*People v. Totari* (2002) 28 Cal.4th 876, 884, citing *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192.)

Since defendant has already been deported, his entitlement to relief turns on the other two prongs of the test: lack of proper advisement and prejudice. "When the ground for withdrawing the guilty plea is the omission of advisement of the [immigration] consequences of the plea, the defendant must show ignorance: that he was actually unaware of the possible consequences of his plea." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1619.) When defendant entered his plea, he orally acknowledged

---

[2]Section 1016.5, in pertinent part, provides: "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, . . . the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

that he had reviewed the front and back of his felony plea form with his attorney and that he had initialed and signed the form. The front of the form consisted of three sections: (1) Advisement of Rights, (2) Consequences of Plea, and (3) Defendant's Statement. In the second and third sections, defendant's initials cover two or three of the paragraphs. In each section, the paragraphs that were inapplicable to defendant are marked "N/A." The immigration consequences paragraph, which is in the second section, is not covered by any part of defendant's initials and is not marked "N/A." Defendant's declaration which states he asked his attorney if pleading guilty would cause him to lose his green card does indicate his awareness of possible immigration consequences. Although his declaration states his attorney incorrectly advised him, the trial court was free to reject the statement.

Assuming, arguendo defendant was not properly advised, he has failed to demonstrate prejudice under the third prong of *Zamudio*. "'[W]hen the only error is a failure to advise of the consequences of the plea . . . the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is "reasonably probable" the defendant would not have pleaded guilty if properly advised.' [Citations.]" (*People v. Superior Court* (*Zamudio*)*, supra,* 23 Cal.4th at p. 210.)

"'In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and

the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain.'" (*In re Resendiz* (2001) 25 Cal.4th 230, 253, quoting *In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Defendant's declaration states he would not have pled guilty if counsel had informed him he would be deported as a consequence of his guilty plea. As the Supreme Court has recognized, a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only one that could affect his calculations regarding the advisability of pleading guilty to criminal charges. (*People v. Superior Court* (*Zamudio*)*, supra,* 23 Cal.4th at pp. 206-207.) However, as a general rule, a self-serving declaration lacks trustworthiness (*People v. Duarte* (2000) 24 Cal.4th 603, 611), and the trial court appears to have discredited or given little weight to defendant's self-serving declaration. As is the case with most evidentiary rulings, determinations of defendant's credibility and the evidentiary value of his self-serving declaration were within the trial court's discretion. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.) Furthermore, his self-serving assertion he would not have pled guilty "'must be corroborated independently by objective evidence.'" (*In re Resendiz, supra,* 25 Cal.4th at p. 253, quoting *In re Alvernaz, supra,* 2 Cal.4th at p. 938.) The record before us fails to disclose any.

Defendant has not argued that his attorney inaccurately communicated the plea offer. Nor has he adduced any evidence suggesting the prosecutor might ultimately have

agreed to a plea that would have allowed him to avoid adverse immigration consequences. While the prosecution did not introduce evidence in this regard, the burden remains defendant's to prove by a preponderance of the evidence his entitlement to relief. (*In re Resendiz, supra,* 25 Cal.4th at p. 254.) He was charged with two counts of receiving stolen credit cards, assaulting an officer and resisting arrest. He has not claimed innocence or offered evidence to show how he might have been able to avoid conviction or what specific defenses might have been available to him at trial. He faced a maximum time of three years eight months in state prison. Instead, two of the charges were dismissed and he was offered and received concurrent low terms of one year four months with credit for time served. Thus, he received a very favorable bargain.

Finally, the choice that defendant would have faced at the time he was considering whether to plead would not have been between pleading guilty and being deported, on the one hand, and, on the other, going to trial and avoiding deportation. By insisting on trial, defendant would have retained a theoretical possibility of evading the conviction that made him deportable and excludable, but a conviction following trial would have subjected him to the same immigration consequences.

Based on our examination of the record, we are not persuaded that it is reasonably probable defendant would have forgone the distinctly favorable outcome he obtained by pleading guilty and insisted, instead, on proceeding to trial had he been fully advised about the immigration consequences of pleading guilty.

In view of the foregoing, we conclude the trial court did not abuse its discretion

when it denied defendant's motion to withdraw his guilty plea.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

GAUT
J.